

ROBERT HATTUM d.b.a. HATTUM	:	Order Affirming Decision
FAMILY FARMS and HATTUM CUSTOM	:	
FARMS,	:	
Appellant	:	
	:	
v.	:	Docket No. IBIA 00-85-A
	:	
GREAT PLAINS REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 20, 2001

This is an appeal from an April 27, 2000, decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), declining to grant retroactive approval under 25 U.S.C. § 81 to four contracts for custom farming between Robert Hattum d.b.a. Hattum Family Farms and Hattum Custom Farms (Appellant) and the Crow Creek Sioux Tribe d.b.a. Crow Creek Farm Enterprise, Dacotah Farms, and Crow Creek Farms (Tribe).

The four contracts were entered into between 1993 and 1998. None were approved by any BIA official, although the Superintendent, Crow Creek Agency, signed as a witness for one of them. In 1998, the Tribe and one of its members, William Shields, Jr., filed suit against Appellant to recover money paid by the Tribe under the four contracts. The suit was filed under authority of 25 U.S.C. § 81, which then provided:

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid. [1/]

1/ Suits brought under this provision are termed "qui tam" actions. The authority for bringing such actions was eliminated when 25 U.S.C. § 81 was revised on Mar. 14, 2000, by the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46.

On February 2, 2000, the United States District Court for the District of South Dakota held that the four contracts, with the exception of portions dealing with sharecropping and salary payments, were null and void for lack of approval under section 81. United States ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms, 102 F. Supp. 2d 1154 (D.S.D. 2000).

On February 11, 2000, Appellant asked the Superintendent to have the contracts approved retroactively. ^{2/} He noted the district court decision and contended:

Retroactive approval would be fair to all concerned - including [Appellant] and [the Tribe]. If there are any disputes between the parties relating to the performance of the contracts, those could still be debated and resolved. Retroactive approval of these contracts would prevent the grossly unfair application of 25 U.S.C. § 81. Since [the Tribe] received the benefit of a crop and related government program payments produced at substantial cost to [Appellant], retroactive approval seems the only fair thing to do.

Appellant's Feb. 11, 2000, Letter to Superintendent at 2.

The Superintendent forwarded the request to the Regional Director, who responded to Appellant on April 27, 2000, stating: "There is no indication that [the Tribe] requested our approval of these agreements. Absent a request from the Tribe, we believe it would not be appropriate to approve the four contracts/agreements."

Appellant then appealed to the Board.

The Regional Director challenges Appellant's standing here, making arguments similar to those made by the Midwest Regional Director in Madison Gas and Electric Co. v. Acting Midwest Regional Director, 36 IBIA 74 (2001). For the reasons discussed in Madison Gas and Electric Co., the Board finds that Appellant has standing to bring this appeal.

Appellant seeks retroactive approval of his contracts, contending that such approval was authorized in United States ex rel. Buxbom v. Naegele Outdoor Advertising Co., 739 F.2d 473 (9th Cir. 1984), cert. denied, 469 U.S. 1109 (1985). He contends that retroactive approval is necessary to prevent a great injustice to him. Further, he contends that such approval should be granted in acknowledgment of the fact that, prior to the revision of section 81 in March 2000, there was great confusion within BIA and elsewhere as to which agreements required approval under that provision.

^{2/} Appellant also appealed the district court decision. On Dec. 19, 2000, that decision was affirmed by the United States Court of Appeals for the Eighth Circuit. United States ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms, No. 00-1691 (8th Cir. Dec. 19, 2000) (per curiam).

Buxbom was a qui tam action in which, at the district court level, an agreement between Naegele and the Morongo Band of Mission Indians was held invalid for lack of approval under section 81. United States ex rel. Buxbom v. Naegele Outdoor Advertising Co., No. 82-6269RG(MCX) (C.D. Cal. June 23, 1983), 10 Indian L. Rep. 3099. While the case was pending on appeal, BIA approved the agreement. The Ninth Circuit found the approval to be effective retroactively, thus depriving Buxbom of an action under section 81.

The Regional Director contends that this case differs from Buxbom in that, here, the qui tam action was brought by the Tribe itself whereas in Buxbom, the action was brought by a third party. The Regional Director also observes that there was no evidence in Buxbom that the Morongo Band ever sought to repudiate its contract.

The district court decision in Buxbom shows that the qui tam plaintiff was Naegele's business competitor and was evidently using section 81 to pursue a claim of unfair competition against Naegele. 3/ As the Regional Director argues, there is absolutely no evidence that the Morongo Band condoned the qui tam action. 4/ Buxbom clearly does not stand for the proposition that BIA must review a tribal contract over the objection of the tribe concerned.

Former 25 U.S.C. § 81 was intended to protect tribes, not those doing business with tribes. Enterprise Management Consultants, Inc. v. United States, 685 F. Supp. 221, 222-23 (W.D. Okla. 1988), aff'd, 883 F.2d 890 (10th Cir. 1989); United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co., 616 F. Supp. 1200, 1208 (D. Minn. 1985), appeals dismissed, 789 F.2d 632 (8th Cir. 1986); Johnson v. Acting Phoenix Area Director, 25 IBIA 18, 25 (1993); Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123, 130 (1990). Thus, to the extent that BIA had an obligation to review the contracts under section 81, its obligation was toward the Tribe, not Appellant.

The Tribe clearly objects to approval of the contracts. Not only did it file a qui tam action against Appellant, it has expressed its views forcefully in its filings before the Board.

3/ Upon finding Naegele's agreement invalid, the court stated:

"This decision is reached with considerable reluctance, since the heart of this action is really an unfair competition dispute between Buxbom and Naegele. The court cannot believe that Congress intended that section 81 be used by a business competitor to void the contract of his rival with an Indian tribe, especially when the latter was both represented by counsel and derived substantial benefits from the contract." 10 Indian L. Rep. at 3100.

4/ In earlier proceedings, the Morongo Band had sought approval of a lease with Naegele. After BIA's disapproval of the lease, the Band and Naegele entered into the agreement which became the subject of Buxbom. The Band also pursued an administrative appeal of the lease disapproval. See Morongo Band of Mission Indians v. Sacramento Area Director, 7 IBIA 299, 86 I.D. 680 (1979).

Federal courts have found it appropriate for BIA to consider a tribe's repudiation of a contract in determining whether or not to approve the contract. E.g. Ho-Chunk Management Corp. v. Fritz, 618 F. Supp. 616, 620 (W.D. Wis. 1985); United States ex rel. Shakopee Mdewakanton Sioux Community, 616 F. Supp. at 1213.

The Board concludes that, under the circumstances of this case, the Regional Director reasonably declined to approve Appellant's contracts.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's April 27, 2000, decision is affirmed.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge